



Date: June 30, 1998
Case No.: 97-INA-459

In the Matter of:

MR. BRUCE NEWBERG,
Employer,

on Behalf of:

ARMIDA JIMENEZ,
Alien.

BEFORE: Guill, Lawson and Vittone
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises from Employer's request for review by the Board of Alien Labor Certification Appeals ("BALCA" or "Board") of a denial of alien labor certification by a U.S. Department of Labor Certifying Officer ("CO").¹ Employer is a parent seeking to fill the position of "Tutor."² (AF 60).³

In a Notice of Findings ("NOF") dated June 19, 1996, the CO proposed to deny certification on the ground that Employer's job description included an unduly restrictive requirement by asking for two years of experience in the position offered or in the related occupation of "Spanish Tutor." (AF 55-56, 60). The CO found that the position described was

¹Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A), and the implementing regulations at 20 C.F.R. Part 656. Unless otherwise noted, all references to the Code of Federal Regulations will be to 20 C.F.R.

²099.227-034 TUTOR (education): Teaches academic subjects, such as English, mathematics, and foreign languages to pupils requiring private instruction, adapting curriculum to meet individual's needs. May teach in pupil's home.

GOE: 11.02.01 STRENGTH: L GED: R5 M3 L5 SVP: 7 DLU: 77

³References to the appeal file are abbreviated "AF".

more like that of a “Children’s Tutor”⁴ than that of an academic “Tutor.”⁵ (AF 54). As a children’s tutor, the position would require only six months to one year of experience. The CO thus found the two year requirement to be unduly restrictive. (AF 55-56). The CO also found that no full-time employment existed, reasoning that Employer was inflating his hours by paying the tutor for time spent preparing lesson plans and consulting with the parents, where that was not the standard practice among private tutors and tutorial services. (AF 57).

As corrective action for the unduly restrictive job requirement, the CO requested that Employer either delete the requirement and offer to retest the labor market, document that the requirement was common, or prove a business necessity existed for the requirement. (AF 56-57). To overcome the charge of a lack of full-time employment, the CO requested that Employer “provide documentation supporting [his] choice to pay for lesson planning and [] consultation,” notwithstanding the fact that other tutors and tutorial services do not charge for such services. (AF 57).

Employer submitted timely rebuttal dated July 19, 1996. (AF 30-52). Employer disagreed with the CO’s characterization of the job duties, claiming that because Alien would engage primarily in academic instruction, her duties would be more analogous to those of a tutor rather than those of a children’s tutor. (AF 45-46). Employer asserted further that Alien would perform none of the duties typical of a children’s tutor except for the foreign language and cultural instruction. (AF 46). On the other hand, Employer argued, Alien would be assisting in academic subjects such as mathematics, spelling, and reading as well as teaching Spanish. (AF 50-52). Those activities, asserted the Employer, comport more closely with those of a tutor for whom the experience requirement is between two and four years. (AF 46). Employer argued that because the job was that of a tutor, the two year experience requirement was not unduly restrictive. (AF 46).

On the issue of full-time employment, Employer stated in his rebuttal that he was willing to pay the tutor for time spent planning and consulting and therefore was not inflating the hours required for the job. (AF 46). He included a tutor schedule (AF 43-44), a proposed lesson plan (AF 50-52), and a statement from his accountant that he possessed adequate funds to pay a full-time tutor at the indicated salary. (AF 49). He asserted, therefore, that the position was one for full-time employment. (AF 46).

DISCUSSION

Section 656.21(b)(2)(i)(B) states that where a job description’s requirements do not exceed those listed in the Dictionary of Occupational Titles (“DOT”) it will not be considered

⁴099.227-010 CHILDREN’S TUTOR (domestic ser.): Cares for children in private home, overseeing their recreation, diet, health, and deportment: Teaches children foreign languages, and good health and personal habits. Arranges parties, outings, and picnics for children. Takes disciplinary measures to control children’s behavior. Ascertains cause of behavior problems of children and devises means for solving them. When duties are confined to care of young children may be designated Children’s Tutor, Nursery (domestic ser.).
GOE: 10.03.03 STRENGTH: L GED: R4 M2 L4 SVP: 5 DLU: 77

⁵See *supra* note 2.

unduly restrictive. *See Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*). The resolution of the issue of whether Employer has included an unduly restrictive job requirement turns on whether the position is that of a tutor or children's tutor. If the position is that of a tutor, then Employer's experience requirement falls within the SVP requiring between two and four years of experience in the position offered or a related occupation, and it is not unduly restrictive. *See Manuel Reyes*, 89-INA-22 (Nov. 28, 1989). On the other hand, if the position is that of a children's tutor, requiring only six months to one year of experience, then Employer's two year experience requirement is unduly restrictive and he will have to prove that a business necessity exists for the requirement. *See A & B Auto Glass*, 90-INA-321 (Sept. 17, 1991). We find that this position is one of a tutor and not a children's tutor.

According to the definition in the DOT, the tutor focuses primarily on academic subjects such as mathematics, spelling, and possibly foreign languages.⁶ The children's tutor focuses on behavior, diet, culture, and may also teach a foreign language.⁷ The CO stated that the job duties were more like those of a children's tutor because the Alien was going to instruct the children in Spanish and teach them about Spanish culture. (AF 54). The CO relied on *Julie C.L. Yuen Chin*, 91-INA-321 (Feb. 19, 1993), as support for this proposition. (AF 54). Employer asserted that the job was one of a tutor because it involved only academic instruction, and none of the disciplinary or dietary and health monitoring functions of a children's tutor. (AF 45-46). Employer's ETA-750A describes the duties of the job to include instruction in Spanish language and culture, as well as tutoring in other school subjects as needed. (AF 60).

Where the duties of the tutor are broader than teaching academics and include those listed in the DOT definition of a children's tutor, then that definition may apply. In *Chin, supra.*, the employer sought to hire a tutor to instruct her children in the Chinese language, culture, and norms of behavior. *Id.* In a supplemental letter to the state employment agency, the employer said that she needed the tutor to teach the children to speak Chinese, as well as "act, think, and behave like a Chinese." *Id.* Further, the employer stated that the tutor would operate as "a teacher . . . and as a model, a facilitator, a guide, and *an enforcer.*" *Id.* (emphasis added).

On the other hand, here Employer's tutor schedule, lesson plan, and job description all point towards predominantly academic instruction. (AF 43-44, 50-52, 60). Nowhere did Employer suggest that Alien would be responsible for disciplining the children or overseeing their diet. Rather he stated affirmatively in his affidavit that Alien would be responsible only for academic instruction, and that he, extended family, or a babysitter would perform the disciplinary and dietary and health monitoring functions. (AF 44, 45-46).

The DOT definitions are supposed to be a guide and not to be applied mechanically. *See Promex Corp.*, 89-INA-331 (Sept. 12, 1990). We agree that there is overlap between the two definitions because of the foreign language and cultural instruction.⁸ Employer's job description

⁶ *See supra* note 2.

⁷ *See supra* note 4.

⁸ *See supra* notes 2, 4.

here, however, is much more closely aligned with the DOT definition of a tutor than that of a children's tutor. The job description includes every element needed for a tutor, and lacks critical elements required for a children's tutor such as disciplinary and dietary and health monitoring functions. (AF 60). Therefore, it is proper to classify the job as that of a tutor. *See Richard Lum*, 94-INA-219 (June 27, 1995). Because we classify the job as a tutor with an experience requirement between two and four years, and Employer requires two years experience, the requirement is not unduly restrictive.

The next issue for consideration is whether Employer is offering full-time employment. In her NOF, the CO stated that Employer was inflating the hours required for the job by including the time spent by the tutor for meal breaks, preparing lesson plans, and consulting with parents, because private tutors and tutorial services did not charge for time spent on those activities. (AF 57). As corrective action, the CO specifically requested that Employer provide documentation supporting his choice to pay for that time. (AF 57). Employer provided an affidavit asserting his willingness to pay for that time, as well as a letter from his accountant demonstrating his ability to pay for those services. (AF 45-46, 49). The CO nonetheless denied certification on the ground that Employer had not provided documentation "on the optimal cost of services." (AF 29).

A denial, which is based on unsupported comparisons to jobs with other employers will not be affirmed. *See Central Korean Evangelical Church*, 88-INA-336 (Nov. 22, 1988). In *Central Korean Evangelical Church*, the CO proposed to deny certification for a choir director on the ground that the employer lacked the ability to provide full-time employment. *Id.* As corrective action, the CO requested that the employer respond to five specific interrogatories establishing the bases of such employment. *Id.* The employer responded in detail, but in his Final Determination the CO rejected the employer's responses, claiming that the small church choir involved did not require a "demanding schedule," and that "larger churches" did not require full work days from their choir directors. *Id.* The Board reversed the CO on that issue because he provided no evidence to support his assertions and because the Board found that the employer had responded adequately to the CO's interrogatories. *Id.*

Similarly in this matter, the CO asserted that private tutors and tutorial services do not charge for planning time and consulting time, but provided no evidence to support that assertion. (AF 57). Further, the corrective action the CO requested consisted solely of documentation establishing that Employer *chose* to pay for the services that the CO asserted were not normally compensated. (AF 57). Employer provided precisely such documentation through a statement in his affidavit that he was willing to pay for the services, and a letter from his accountant establishing his ability to pay. (AF 45-46, 49).

The CO rejected Employer's rebuttal because it did not include documentation on the optimal cost of services. (AF 29). The CO did not request that information in the NOF, and thus could not raise the issue in the FD. *See Daniel and Margery Callahan*, 90-INA-201 (Sept. 3, 1991). Further, because the original documentation requested by the CO revolved around Employer's *choice*, it was not capable of support by independent documentation. (AF 57). Where evidence is not supportable by independent documentation, and the Board determines that it can rely on the credibility of the statements after evaluating factors such as the source of knowledge, the surrounding facts and circumstances, and other indicia of honesty and credibility,

it will give such statements similar weight to evidence which is supported by independent documentation. *See Mr. and Mrs. Jeffrey Hines*, 88-INA-510 (Apr. 9, 1990). Here, Employer provided detailed documentation in response to the CO's request wherever possible and nothing in the record indicates any bad faith in the recruitment process by Employer. Thus, we have no reason not to consider as adequate Employer's testimony regarding his choice to pay a tutor for time spent planning lessons and consulting with the parents. Because the CO based her initial finding on an unsupported assertion regarding the practices of other employers, and Employer responded adequately to her request for corrective action, the CO's denial of labor certification as to the issue of full-time employment will be reversed.

Based on our reversal of the CO on the issue of an unduly restrictive job requirement, and also on the issue of full-time employment, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED**, and the application for labor certification is hereby **GRANTED**.

SO ORDERED.

For the Panel:

JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the

granting of the petition the Board may order briefs.